

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7628

Joint Petition of Green Mountain Power Corporation,)
Vermont Electric Cooperative, Inc., and Vermont)
Electric Power Company, Inc. for a certificate of public)
good, pursuant to 30 V.S.A. Section 248, to construct up)
to a 63 MW wind electric generation facility and)
associated facilities on Lowell Mountain in Lowell,)
Vermont, and the installation or upgrade of)
approximately 16.9 miles of transmission line and)
associated substations in Lowell, Westfield and Jay,)
Vermont)

Order entered: 11/14/2011

ORDER RE MOTION FOR EMERGENCY STAY OF BLASTING

INTRODUCTION

On November 1, 2011, the towns of Albany and Craftsbury (the "Towns") filed with the Public Service Board ("Board") a Motion for Emergency Stay of Blasting ("Motion").¹ Later that day the Clerk of the Board issued a memorandum establishing November 4, 2011, as the deadline for responses to the Motion.

On November 4, 2011, Green Mountain Power Corporation ("GMP") filed its Opposition to Joint Motion for Emergency Stay of Blasting ("GMP Opposition"). Also on November 4, 2011, the Department of Public Service ("Department") filed its Brief of the Department of Public Service in Response to the Board's Memorandum Dated November 1, 2011 Regarding Joint Motion for Stay of Blasting ("Department Brief"), and the Towns filed a letter in response

1. The Motion purports to be a joint motion filed by the Towns as well as Donald and Shirley Nelson (the "Nelsons"). However, the Nelsons, who have appeared pro se in this proceeding, did not sign the Motion. In response to a November 1, 2011, Memorandum from the Board Clerk's Office, counsel for the Towns indicated that he does not represent the Nelsons and that a signature line for the Nelsons was inadvertently left off the Motion. *See*, letter from Jared Margolis, Esq., to Susan M. Hudson, Clerk, filed November 2, 2011. However, the Board still has not received any filing from the Nelsons to join in the Motion. Accordingly, we must treat the Motion as being filed only by the Towns.

to the GMP Opposition ("Towns' 11/4 letter"). Lastly, on November 7, 2011, GMP filed a letter in response to the Department Brief ("GMP 11/7 letter").

In this Order we deny the Motion because the Towns do not have standing to request the relief they seek, and because even if they did have standing, they have failed to meet the applicable standard for the issuance of an injunction. Additionally, the Towns have failed to demonstrate a violation of the Certificate of Public Good ("CPG"), therefore we deny the request to direct GMP to cease blasting at the project site or to impose any other sanctions at this time. Lastly, we explain why we do not accept the Department's contention that GMP violated its CPG by allowing unauthorized individuals to be present in the blast area.

The Towns' Motion

The Towns assert that GMP has violated its CPG because it has failed to comply with regulations issued by the Department of the Interior's Office of Surface Mining Reclamation and Enforcement ("OSM"). Specifically, the Towns assert that GMP violated the requirements of 30 C.F.R. §§ 816.67(c)(3) and 817.67(c)(3), which prohibit the casting of flyrock "beyond the permit boundary."² The Towns also argue that GMP has failed to comply with state blasting regulations adopted by the Vermont Division of Fire Safety. Specifically, the Towns argue that GMP violated sections 11.3.1 and 11.3.2 of the National Fire Protection Association's ("NFPA") Standard 495,³ which governs the use of explosive materials, by allowing flyrock to land on the Nelsons' property and to travel more than 50 feet from the blast site.⁴ The Towns submitted affidavits from two individuals who were on the Nelsons' property on October 28, 2011, in support of their contention that a portion of a blast mat and a small amount of flyrock landed on the Nelsons' property as a result of a blast that took place that day.

In response to the GMP Opposition, the Towns argue that Condition 36 of the CPG makes the OSM regulations applicable to all aspects of blasting at the project site.⁵ The Towns

2. Motion at 1-2.

3. Vermont has adopted the NFPA Uniform Fire Code ("NFPA 1") as part of its Vermont Fire and Building Safety Code. NFPA 1 dictates that the use of explosives shall be governed by NFPA Standard 495.

4. Motion at 2-3; Towns' 11/4 letter at 2.

5. Towns' 11/4 letter at 3.

also assert that once GMP begins to enforce a temporary restraining order that it obtained from the Orleans Superior Court requiring project protesters to vacate a 1,000-foot safety zone that extends onto the Nelsons' property, GMP will resort to using larger blasts and fewer blast mats. The Towns contend that, since flyrock was propelled onto the Nelsons' property while GMP was using smaller blasts and more blast mats than it had originally intended, reverting to the larger blasts with fewer mats will almost certainly result in flyrock landing on the Nelsons' property in violation of applicable regulations and the CPG.⁶ Lastly, the Towns' argue that they do not need to meet the standard for injunctive relief because they did not file a motion for such relief. Rather, they contend that they were bringing the matter of a CPG violation to the Board's attention so that the Board can investigate and take appropriate action, which, according to the Towns, would be the Board directing GMP to halt all blasting activities at the project site until it can demonstrate that blasting can be conducted in compliance with all applicable regulations and the CPG.⁷ The Towns contend that because they are not seeking injunctive relief, their standing is not at issue, and even if it were, the Nelsons have standing to seek the requested relief because they have not consented to GMP's use of their property as part of a safety zone.⁸

The GMP Opposition

GMP argues that the Towns have failed to demonstrate that they are entitled to a stay because they failed to address the likelihood of success on the merits, irreparable harm to the Towns if a stay is not issued, harm to other parties if a stay is issued, and the best interests of the public.⁹ With respect to likelihood of success on the merits, GMP asserts that the Towns have failed to show any violation of the CPG and applicable regulations because NFPA Standard 495 requires GMP to "exercise care and employ precautions" designed to prevent the uncontrolled release of flyrock or its propulsion onto neighboring property. It does not, GMP contends, prohibit blasting whenever it cannot "be guaranteed with absolute certitude that flyrock will not

6. Towns' 11/4 letter at 1-3, 5.

7. The Towns suggest that, in the alternative, the Board should issue an Order requiring GMP to continue to utilize smaller blasts and more blast mats to ensure that applicable regulations are met.

8. Towns' 11/4 letter at 5.

9. GMP Opposition at 2.

be propelled beyond the blast area and Project property, or that all blasting must be stopped in the event of such an occurrence regardless of the circumstances." GMP argues that this interpretation is supported by the fact that under Vermont law blasting is considered an ultrahazardous activity whose risks cannot be entirely eliminated even with the exercise of great care. GMP asserts that the imposition of strict liability for any damages caused by a blaster regardless of the degree of care exercised is a recognition that some degree of risk remains even when significant precautions are taken.¹⁰ While GMP contends, with its own supporting affidavits, that no rock fragments were propelled onto the Nelsons' property as a result of the October 28 blast, it argues that even if rock fragments were propelled onto the Nelsons' property, that there was no violation of NFPA Standard 495 or the CPG because it utilized an appropriate amount of care to control the release of flyrock and prevent its transfer onto the Nelsons' land. GMP also argues that the OSM regulations cited by the Towns do not apply to the control of flyrock, but instead apply to limit peak particle velocity and ground vibrations.¹¹ Lastly, GMP asserts that the Towns do not have standing to bring the current motion because their intervention under 30 V.S.A. § 248(b)(5) was limited to impacts within the Towns themselves, and the area in question is located entirely within the Town of Lowell.

With respect to irreparable harm, GMP contends that the alleged harm suffered by the Nelsons, the propulsion of two small pieces of flyrock and a portion of a blast mat onto their property, simply does not constitute irreparable harm if a stay is not issued. GMP also argues that the issue of irreparable harm from the October 28 blast was already litigated in Orleans Superior Court and that the Nelsons are therefore collaterally estopped from relitigating the same claim before the Board.¹²

GMP also claims that it will be substantially harmed if a stay is issued because it will result in a delay in the project's construction, resulting in the potential loss of federal Production Tax Credits ("PTCs") and increased construction and development costs.¹³

10. GMP Opposition at 3-4.

11. GMP Opposition at 5.

12. GMP Opposition at 7-8.

13. GMP Opposition at 8.

Lastly, GMP argues that issuance of a stay is not in the public's interest because it would put the project at risk, possibly causing the loss of jobs created by the project and millions of dollars to be paid in taxes by the project. It would also place at risk a renewable energy generation facility that is supported by state legislative policy, as well as a source of long-term stably priced power.¹⁴

The Department Brief

The Department states that it believes there was a violation of the CPG, regardless of whether any pieces of flyrock were propelled onto the Nelsons' property.¹⁵ The Department contends that the presence of protesters on the Nelsons' land and within the 1,000-foot safety zone is a violation of the approved Blasting Plan as well as OSM regulations that require access to the blast area to be restricted to authorized personnel. The Department asserts that GMP's decision not to enforce the Orleans Superior Court's temporary restraining order resulted in a violation of these controlled-access requirements. However, given the existence of the restraining order, and assuming it is enforced, the Department does not believe the Board needs to take any action to ensure that no unauthorized persons are allowed into the blast area at prohibited times. In the event the Board determines that a violation of the CPG that warrants sanctions did occur, then the Department will provide further briefing on that issue.¹⁶

The GMP Response to Department Brief

GMP contends that the Department is incorrect and that no unauthorized persons were present in the blast area during the October 28 blast. GMP contends that the Department has incorrectly conflated the blast area with the larger safety area, which its blasting contractor established consistent with industry practices. The blast area, according to GMP, is the area extending outward from the blast holes in which blast debris are designed to fall, and no

14. GMP Opposition at 9.

15. The Department states that, based on the affidavits submitted by the Towns and GMP, there is a factual dispute as to whether any flyrock actually landed on the Nelsons' property and that a hearing would therefore be required to resolve that issue.

16. DPS Brief at 3-5.

unauthorized individuals were within this area. The larger safety area is an area extending beyond the blast area where it is highly unlikely any blast debris will fall but, even with proper precautions having been taken, there still remains a slight risk that debris may reach that area. According to GMP, the individuals on the Nelsons' property on October 28 were within the safety area, but beyond the confines of the blast area, meaning there was no violation of the Blasting Plan or any applicable regulations.¹⁷

DISCUSSION

1. The Towns' Motion

We deny the Towns' Motion because Albany and Craftsbury do not have standing to seek the relief they have requested and because they have failed to demonstrate that they are entitled to injunctive relief even if they had such standing. Additionally, the Towns have not demonstrated non-compliance by GMP with the CPG or any applicable laws and regulations. Therefore, we decline to direct GMP to cease blasting at the project site or to impose any other sanctions for the October 28 blast.

Albany and Craftsbury were granted permissive intervention on the topic of public safety, but only to the extent impacts were experienced within the Towns' borders.¹⁸ According to GMP, the area that is the subject of the current dispute is located entirely within the Town of Lowell. The Towns do not dispute this assertion, and instead argue that they are not filing a motion for a preliminary injunction but rather "have simply brought to the Board's attention inappropriate activities on the Project site that are not in conformance with applicable state and federal regulations, and therefore violate the Board's Order, and are asking that the Board take action" in response to the alleged violations. The Towns also respond that the Nelsons do have standing as the property owners whose land is being utilized as a safety zone by GMP.¹⁹

17. GMP 11/7 letter at 1-2.

18. Docket 7628, Order of 9/3/10 at 15-16.

19. Towns' 11/4 letter at 5. We are somewhat troubled that counsel for the Towns has stated that he does not represent the Nelsons, yet in several instances relies on the interests of the Nelsons in an attempt to advance the position of the Towns.

Because the Towns' intervention on matters of public safety was limited to impacts within the Towns' boundaries, they have no standing to file a motion seeking injunctive relief for impacts to property within the Town of Lowell. That the Nelsons might have standing on this issue is of no support to the Towns. Counsel for the Towns has stated that he does not represent the Nelsons, and the Motion bears only the signature of the Towns' counsel. While the body of the Motion states that it is a joint motion by the Towns and the Nelsons, the Nelsons have not signed the Motion and it therefore cannot be considered to have been filed by them.²⁰ Additionally, even if the Nelsons had signed the Motion or if the Towns had standing to bring the Motion, it is undeniably a motion seeking injunctive relief and the Towns have, by their own admission, made no attempt to demonstrate that they are entitled to such relief.²¹

Given the lack of standing by the Towns and the lack of a signature on the Motion by the Nelsons, we conclude that the filing is in effect a public comment that brings to the Board's attention a potential CPG violation. Accordingly, GMP and other parties with standing on the issue were afforded an opportunity to respond, albeit a relatively short opportunity due to the potentially serious nature of the issues identified in the Motion. However, after reviewing the materials submitted by the parties, we conclude that the Towns have failed to demonstrate non-compliance by GMP with the CPG or any applicable laws and regulations, even if the fragments of flyrock alleged to have landed on the Nelsons' property actually did fall there. Therefore, at this time there is no basis for us to direct GMP to cease blasting activities or impose other sanctions.

The issue of flyrock associated with blasting is governed by both express language in the CPG and by certain sections in NFPA Standard 495. The relevant language from the CPG is found in Condition 36 and states, "blasting mats will be used where needed to limit the occurrence of flyrock."²² With respect to the October 28 blast, 16 separate blast mats were used to cover each of 21 separate blast holes. It appears that the only reason a small number of

20. See, PSB Rule 2.203.

21. Additionally, the question of irreparable harm to the Nelsons from the October 28 blast has already been litigated in Orleans Superior Court so the Nelsons may be collaterally estopped from litigating that issue before the Board. Given our ruling today, that is not an issue we need to resolve.

22. Docket 7628, CPG dated May 31, 2011, at ¶ 36.

fragments of flyrock may have landed on the Nelsons' property, a point contested by GMP, is that one of the blast mats apparently malfunctioned and a small piece was blown free.²³ Given GMP's explanation regarding its use of blast mats to control flyrock during the October 28 blast, we conclude that the Towns have not demonstrated that GMP violated this language of the CPG.

The relevant language from NFPA Standard 495 states that flyrock shall not be cast from the blast site "in an uncontrolled manner that could result in personal injury or property damage."²⁴ Also, "Flyrock shall not be propelled from the blast site" onto property that has not been contracted by the blasting operator or for which the property owner has not granted a written waiver.²⁵ The Towns appear to argue that NFPA Standard 495 prohibits the casting of flyrock more than 50 feet from the blast site.²⁶ This is incorrect. Section 11.3.1 states that flyrock shall not be cast beyond the blast site "in an uncontrolled manner that could result in personal injury or property damage."²⁷ The whole point behind the use of blast mats and blast designs is to ensure that the release of flyrock beyond the 50-foot blast site happens in a controlled manner with safeguards to prevent personal injury or property damage. It is not a prohibition on flyrock traveling more than 50 feet.²⁸ More to the point is section 11.3.2, which prohibits flyrock from being cast onto neighboring properties absent a written waiver, which has not been obtained in this case from the Nelsons. However, as GMP argues, blasting is an ultrahazardous activity and it can never be guaranteed with absolute certainty that blast debris will never be cast beyond the blast area onto neighboring properties regardless of the number and quality of precautions taken, which is why strict liability applies if personal injury or property damage results when such an event occurs.

23. GMP Opposition at 2.

24. NFPA 495 § 11.3.1.

25. NFPA 495 § 11.3.2.

26. Motion at 2-3; Towns' 11/4 letter at 2. The "blast site" is defined as an area where explosives are handled while loading blast holes, encompassing 50 feet in all directions from the perimeter formed by loaded blast holes. NFPA 495 § 3.3.5.

27. NFPA 495 § 11.3.1.

28. The Towns' argument also fails to account for the definition of "blast area" which is the "area including the blast site and the immediate adjacent area within the influence of flying rock, missiles, and concussion." NFPA 495 § 3.3.4.

According to GMP, approximately 13 blasts have occurred within 1,000 feet or less of the Nelsons' property line between the dates of October 19 and November 3, 2011.²⁹ On only one occasion do the Towns allege that a few small fragments of flyrock and a piece of blasting mat fell on the Nelsons' property as a result of the blast on October 28. And, assuming those allegations are true, it appears to have been the result of an unexpected failure in a small portion of one of the many blasting mats being used to control flyrock. It is reasonable to conclude that had the blast mat performed as expected, no debris would have reached the Nelsons' property. Accordingly, we conclude that the information submitted by the parties, including the information submitted by the Towns, indicates that GMP is in fact undertaking appropriate measures to prevent the release of flyrock onto the Nelsons' property, and it was only the result of an unexpected failure in a blast mat that led to the possibility that some small amount of flyrock did cross the property line. As even the Towns admit, NFPA Standard 495 does not require 100% certainty that no flyrock will ever leave the permit boundary.³⁰ Rather, it requires that appropriate precautions be undertaken to control the release of flyrock so that it stays within the permit boundary. Based on the single, isolated instance alleged by the Towns, we do not believe GMP has violated section 11.3.2 of NFPA Standard 495.

We disagree with the Towns' assertion that the OSM regulations referenced in Condition 36 apply to all aspects of blasting at the project site. The application of those regulations is expressly limited to actions taken to "limit peak particle velocity and ground vibration to safe levels."³¹ The Towns acknowledge this limitation but argue that other language makes the regulations applicable to all aspects of blasting at the project site. Specifically, the Towns rely on language that states, "All blasting will be performed in accordance with any and all applicable laws and regulations" The Towns apparently incorrectly believe that the OSM regulations apply to any blasting regardless of the activity it is associated with. However, the OSM regulations apply only to blasting associated with mining activities and therefore are not

29. GMP Opposition at 2.

30. Towns' 11/4 letter at 3.

31. Docket 7628, CPG dated May 31, 2011, at ¶ 36.

"applicable" to the blasting taking place at the project site, other than through the requirements of Condition 36 of the CPG related to peak particle velocity and ground vibration.

Because the Towns do not have standing to seek injunctive relief, nor have they attempted to demonstrate that they are entitled to injunctive relief even if they had standing, the Motion is denied. Additionally, the Towns have not demonstrated non-compliance by GMP with the CPG or any applicable laws and regulations. Therefore, we decline to direct GMP to cease blasting at the project site or to impose any other sanctions for the October 28 blast. We do emphasize, however, that GMP is required to utilize appropriate measures to prevent the release of flyrock onto the Nelsons' property. In the event that there are future instances of flyrock being propelled onto the Nelsons' property in a manner that indicates a potential lack of compliance by GMP, we are prepared to revisit the issue.

2. The Department Brief

The Department asserts that GMP violated requirements that restrict access to the blast area during blasting activities by allowing the project protesters to remain on the Nelsons' property within the 1,000-foot safety zone established by GMP's blasting contractor. We agree with GMP that the Department has incorrectly conflated the safety area with the blast area. The restrictions on access apply to the blast area, which is the area in which debris is expected to fall. The safety area extends beyond this area because no matter the number and quality of precautions taken, a slight risk remains that debris may be cast beyond the blast area. However, neither the regulations cited nor the Blasting Plan restrict access outside the blast area. Accordingly, we do not accept the Department's contention that this constituted a violation of the CPG.

CONCLUSION

Because the Towns do not have standing to seek injunctive relief, nor have they attempted to demonstrate that they are entitled to injunctive relief even if they had standing, the Motion is denied. Additionally, neither the Towns nor the Department have demonstrated non-compliance by GMP with the CPG or any applicable laws and regulations. Therefore, we decline

to direct GMP to cease blasting at the project site or to impose any other sanctions for the October 28 blast.

So ORDERED.

Dated at Montpelier, Vermont, this 14th day of November, 2011.

<u>s/James Volz</u>)	
)	PUBLIC SERVICE
)	
<u>s/David C. Coen</u>)	BOARD
)	
)	OF VERMONT
<u>s/John D. Burke</u>)	

OFFICE OF THE CLERK

FILED: November 14, 2011

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.